

**MTS Incorporated d/b/a Tower Records and Video,
Store No. 126 and United Food and Commer-
cial Workers Union, Local No. 428, AFL-CIO.
Case 32-CA-15133**

February 23, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

Upon a charge filed on December 8, 1995, in Case 32-CA-15133, the General Counsel of the National Labor Relations Board issued a complaint on December 15, 1995, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 32-RC-4026. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On January 16, 1996, the General Counsel filed a Motion for Summary Judgment. On January 19, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 2, 1996, the Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer, the Respondent admits that the Union was certified as the exclusive bargaining representative of the unit and further admits its refusal to bargain, but attacks the validity of the certification and the appropriateness of the unit on the basis of its contentions in the representation proceeding that the Board improperly overruled its objections to the election and failed to hold a hearing with respect to its objections.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation with its main office in Sacramento, California, and a place of business in Mountain View, California, has been engaged in the retail sale of audio and video recordings.

During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received goods or services valued in excess of \$5000 which originated outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held June 9, 1995, the Union was certified on October 13, 1995, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time product buyers, receiving clerks, sales clerks, deposit clerks, and store artists employed by the Employer at Store No. 126, 630 San Antonio Road, Mountain View, California; excluding all confidential employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about October 24, 1995, the Union, by letter, requested the Respondent to recognize and bargain, and, since about December 5, 1995, the Respondent has failed and refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on or after December 5, 1995, to recognize or bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, MTS Incorporated d/b/a Tower Records and Video, Store No. 126, Mountain View, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Food and Commercial Workers Union, Local No. 428, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time product buyers, receiving clerks, sales clerks, deposit clerks, and store artists employed by the Employer at Store No. 126, 630 San Antonio Road, Mountain View, California; excluding all confidential employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Mountain View, California, copies of the attached notice marked "Appendix."¹

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the

Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Food and Commercial Workers Union, Local No. 428, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time product buyers, receiving clerks, sales clerks, deposit clerks, and store artists employed by us at Store No. 126, 630 San Antonio Road, Mountain View, California; excluding all confidential employees, guards, and supervisors as defined in the Act.

MTS INCORPORATED D/B/A TOWER
RECORDS AND VIDEO, STORE NO. 126

National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."